

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket Nos. 09-0155 and 10-0418

USDA
OALJ/OHC

2012 APR 26 PM 4:00

RECEIVED

In re: Terranova Enterprises, Inc., a Texas corporation
d/b/a Animal Encounters, Inc.;
Douglas Keith Terranova, an individual;
Will Ann Terranova, an individual;
Farin Fleming, an individual;
Craig Perry, an individual d/b/a
Perry's Exotic Petting Zoo;
Eugene ("Trey") Key, III, an individual;
and Key Equipment Company, Inc.,
an Oklahoma Corporation d/b/a
Culpepper & Merriweather Circus,

Respondents.

**MISCELLANEOUS DECISION AND ORDER DENYING
APPLICATION FOR AN AWARD OF ATTORNEYS' FEES
AND COSTS BY COUNSEL FOR THE KEY RESPONDENTS**

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant") under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131- 2159 ("the Act"; "AWA"). USDA charged Eugene ("Trey") Key, III and Key Equipment Company Inc., d/b/a Culpepper & Merriweather Circus ("Key Respondents"), as well as the other named Respondents, who were represented by other counsel, with violations of the Act. A hearing in docket number 09-0155 commenced on February 17, 2011 and continued through February 25, 2011, in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri.

On December 20, 2011, I issued Findings of Facts and Conclusions of Law in Decisions and Orders that addressed the parties separately. Although I dismissed certain allegations involving the Key Respondents, the gravamen of my conclusions found that the Key Respondents had willfully violated the Act so as to merit the imposition of a cease and desist Order and the suspension of their AWA license.

On March 2, 2012, counsel for the Key Respondents moved for an award of attorney fees and costs. On April 23, 2012, Complainant filed objections. Because of delay in the service of the application to Complainant, I am not entirely sure when service was effected. Therefore, I deem the objection timely filed.

DISCUSSION

An award of attorney fees for the successful prosecution or defense of claims is governed by the Equal Access to Justice Act ("EAJA") sections of, the Administrative Procedures Act ("APA"). 5 U.S.C. §504. An award of attorney's fees against the Government is appropriate if: (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. See, Charles Davidson v. USDA, 62 Agric. Dec. 49 (2003), citing Sims v. Apfel, 238 F.3d 597, 699-600 (5th Cir. 2000). A party is considered to have prevailed if the party succeeded on any significant issue. Id. A party must "receive at least some relief on the merits of his claim before he can be said to prevail." Buckhannon B. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res., 532 U.S. 598, 604 (2001) (citing Hewitt v Helms, 482 U.s. 755, 760 (1987)

In the instant matter, I found that Complainant failed to meet the burden of proving that the Key Respondents were responsible for alleged violations involving

animals owned by the Terranova Respondents. I also found that alleged violations pertaining to the handling of the Key Respondents' adult tiger and newborn cubs, and the housing of the lone surviving tiger cub were not supported by the preponderance of the evidence.

I found that the Government established that the Key Respondents willfully violated the Act by failing to develop a plan of veterinary care and failing to have an attending veterinarian provide adequate care to animals. I further found that Respondents failed to handle animals as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort by failing to provide a tiger cub with proper nutrition and further failed to provide care to a wound that the cub had suffered.

Although I did not agree with the Administrator's determination that Respondents' AWA license should be revoked, I did find that Respondents' conduct demonstrated willful neglect and disregard for the Act and regulations which warranted a suspension of Respondents' activities under the Act for a period not to exceed six (6) months. In addition, I declined to impose civil money penalties only because Respondents had suffered monetary loss through USDA's confiscation of their tiger.

Where a lawsuit involves related claims, attorney fees should not be reduced if a party has won substantial relief. Where a party prevails on some but not all issues, attorney fees are denied only for work performed on a claim that "is distinct in all respects from successful claims." Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). The amount of a fee is determined by the number of hours reasonably expended multiplied by a reasonable hourly rate. Hensley, supra. However, I note that if fees are awarded,

Respondents' counsel would be limited to a maximum hourly attorney rate of \$150.00, pursuant to 7 C.F.R. § 1.186 (2011).

Additionally, an award of fees is not warranted unless the Government's position was not substantially justified. To meet the justification test, the Government's position must be one that is reasonable in law and fact. Pierce v. Underwood, 487 U.S. 552, 565 (1988).

The record before me does not establish that Respondents were a prevailing party because of their successful litigation of certain issues. Respondents' counsel fails to demonstrate that the issues that were successfully litigated led to any relief for their clients. Although I did not impose the extreme sanction of revoking Respondents' AWA license, I reached that conclusion in large part because there was no history of prior violations by Respondents. Respondents have failed to establish that the successful prosecution of the claims that I found to have no evidentiary support would have led to a more severe outcome.

I further find no grounds to award fees for work performed that related only to those allegations that I dismissed. Respondents' counsel's timekeeping method does not segregate the work by issue. Moreover, the allegations that I dismissed were not significantly or substantive distinct from those that I upheld. The dismissed allegations involved a distinct legal issue, which I maintained to be a novel one; i.e., whether two exhibitors who hold licenses under the AWA may be held responsible for the acts of each other with respect to each others' animals. However, the fact that I concluded that the two licensed exhibitors would have to be agents for each other to be held jointly responsible for each other's animals did not in any way mitigate the sanctions that I

imposed because of Respondents' willful violations of the AWA with respect to animals owned solely by Respondents.

Because I find that Respondents were not prevailing parties, I need not examine whether the Government was substantially justified in its position when it charged the Key Respondents with the responsibility for the care and handling of animals owned by the Terranova Respondents, despite the presence of a direct agent of the Terranova Respondents, who was authorized to care for those animals. I also need not review Respondents' counsel's application and supporting documentation to determine the reasonableness of the costs requested.


ORDER

For the reasons set forth herein, the application for an award of fees to counsel for the Key Respondents is DENIED.

This Decision and Order shall become effective and final 35 days from its service upon Respondents' counsel unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 25th day of April, 2012 at Washington, DC.


Janice K. Bullard
Administrative Law Judge